Dispute Resolution Hotline

May 18, 2016

EMPLOYEES AS ARBITRATORS? NO, SAYS DELHI HC

- The Delhi High Court clarifies applicability of Arbitration and Conciliation Amendment Act, 2015 **("Amendment Act")** in case of invocation of arbitrations post October 23, 2015.
- The Delhi High Court stresses the significance of adhering to the detailed guidelines on ineligibility of arbitrators as provided in the Seventh Schedule to the Amendment Act.
- Positive move to do away with the practice of appointment of in-house arbitrators for resolution of disputes.

INTRODUCTION

The Delhi High Court ("**Delhi HC**") in one of its recent judgment in *Assignia-Vil* ("**Petitioner**") *JV v Rail Vikas Nigam Ltd.*("**Respondent**")[1], taking cognizance of the amendment to Section 12(5) of the Arbitration & Conciliation Act, 1996 ("**Act**") held that under the Amendment Act, the court is duty bound to secure appointment of an independent and impartial Arbitral Tribunal.

BRIEF FACTS

The parties entered into a works contract **("Contract")** under which the Petitioner undertook to carry out certain construction works ("**Work**") for the Respondent, to be completed by February 15, 2015. Certain disputes arose between the parties. The Petitioner had raised three claims ("**First Dispute**") against the Respondents during the execution of the Contract and sought payments. Due to failure of Respondent, to resolve issues amicably, an arbitral tribunal **("the First Tribunal")** was constituted in relation to these three claims. The First Tribunal consisted of serving and retired employees of the Respondent and was constituted before the commencement of the Amendment Act.

During the pendency of the First Dispute, an extension of time for completion of work was granted to the Petitioner, however before this period had lapsed the Respondent served a notice of termination to the Petitioner due to faulty execution of the Work. The Petitioner opposed the termination and sought losses suffered due to untimely termination. As the attempt to resolve disputes amicable failed, the Petitioner by its letter dated October 26, 2015 invoked arbitration ("**Second Dispute**") and called upon the Petitioner to suggest five names for constituting an independent arbitral tribunal. The Respondent's failure to respond to the said invocation of arbitration, lead to the present application under Section 11 (6) of the Act.

ISSUE

The issue before the Delhi HC was whether the dispute relating to the termination of the Contract had to be referred to the First Tribunal for resolution, or to a newly constituted independent arbitral tribunal, in view of the Amendment Act.

ARGUMENTS

Contentions of the Petitioner

The Petitioner based their arguments on the following main contentions:-

1. Issue of termination of Contract constitutes a distinct and complicated issue;
2. First Tribunal had been constituted to adjudicate specific issues and only to deal with the three original claims;
3. Nomination of arbitrators who are serving or retired employees would not constitute an independent and unbiased tribunal;
4. Arbitration with respect to the Second Dispute was invoked post October 23, 2016, making provisions of the Amendment Act applicable. The Second Dispute, therefore cannot be referred to First Tribunal.

Contentions of the Respondent

1. The Respondent argued that there was already an existing tribunal and new claims could be added to the pending arbitration. The Respondent had given its consent to add/modify claims subsequent to the termination of contract, to be considered by First Tribunal itself. Placing reliance on *State of Orissa v Asis Ranjan*[2] and *HL Batra & Co. v State of Haryana*[3] and *Shyam Charan Agarwal & Sons*[4] the Respondent argued that additional claims could be raised before the First Tribunal and that there was no legal justification in restricting the scope of arbitration, as the aim of the procedure was to settle all disputes between the parties and avoid future litigation.

Research Papers

Compendium of Research Papers
January 11, 2025

FAQs on Setting Up of Offices in India
December 13, 2024

FAQs on Downstream Investment
December 13, 2024

Research Articles

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals
January 15, 2025

Key changes to Model Concession Agreements in the Road Sector
January 03, 2025

The Revolution Realized: Bitcoin's Triumph
December 05, 2024

Audio

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice
December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper

2. No objections were raised on the independence or impartiality of the First Tribunal by the Petitioner till date and therefore the Second Dispute may also be dealt with by the same tribunal. The Respondent contended that the Petitioner could not demand constitution of a new Tribunal and take benefit of its own mistake, after failing to participate in the proceedings before the First Tribunal

JUDGMENT

The Delhi HC, after hearing all the submissions, held that in the normal course, with due consent of parties, the issue of termination of Contract could be referred to the First Tribunal in the pending arbitration proceedings itself. This would be in the interest of time, cost- efficiency and to avoid conflicting decisions.

The Respondents had relied upon certain case laws to argue that 'all disputes' arising out of an agreement could be referred to the same Arbitral Tribunal, and that therefore the issue of the untimely termination of the contract should also be referred to the first Tribunal. The Delhi HC refered to the Supreme Court's decision in *Dolphin Drilling Limited v Oil and Natural Gas Corporation Limited*[5] which had dealt with the issue of disputes arising between the parties prior to the invocation of arbitration and those arising during the pendency of the arbitration dealing with the past disputes.

The Delhi HC thereafter noted that the First Dispute was invoked before the commencement of the Amendment Act and the Second Dispute was invoked post commencement. On the question of applicability of the Amendment Act, the Delhi HC highlighted that the arbitration clause in the Contract encompassed statutory modifications to the Arbitration and Conciliation Act, 1996, and therefore, since the amendments came into force prior to the invocation of arbitration of the Second Dispute, the provisions of the Amendment Act would apply.[6]

In light of the amendments brought about by the Amendment Act, the Delhi HC held that it was the prerogative of the Petitioner to seek constitution of an independent and impartial Arbitral Tribunal for adjudicating the issue of termination of the Contract, due to change in law under Section 11 (8) of the Act[7] and the fact that the First Tribunal comprised of employees of the Respondent. Having the same tribunal resolve the Second Dispute would negate the very purpose of the amendments to Section 12 of the Amendment Act.[8]

ANALYSIS

The recent judgment may be amongst the first of many heralding a new era for the arbitration regime in India, bringing it in line with international best practices having stringent conflict of interest regimes. It has been common practice for public sector undertakings in India to have a panel of in-house arbitrators that are technically proficient in that particular sector, leading to an unfair advantage over the opposite party.

This judgment has dealt with several aspects in relation to appointment of arbitrators and procedure required to be followed pre and post amendment of the Act. The recourse to statutory provisions for appointment of arbitrator under Section 11(6) arises only upon failure of one party to follow procedure based on terms and conditions of the agreement. It is settled law that in the event of a corporation forfeiting its right to appoint an arbitrator, with similar clauses providing for employees as Arbitrators, the courts are entitled to appoint an independent and impartial arbitrator, giving a go-bye to the terms of the arbitration clause.[9]

In the short term, this judgment may result in the constitution of multiple tribunals dealing with disputes under the same agreement if new disputes have arisen post the Amendment Act, while proceedings are pending for previous disputes before an arbitrator tribunal, unless both parties consent otherwise.

This judgment marks the end of such in-house arbitrators and stresses the importance of compliance with guidelines provided under Section 12(5) read with Seventh Schedule of the Amendment Act for appointment of arbitrators to maintain independence and impartiality. Interestingly, the Delhi HC, by directing the parties to appear before the Delhi International Arbitration Centre, may have taken a conscious decision to go in for institutional arbitration, instead of ad-hoc. This may also be in line with the push for institutional arbitration as was envisaged under the law commission report but did not find place in the Amendment Act.

– Siddharth Ratho, Payel Chatterjee & Vyapak Desai
You can direct your queries or comments to the authors

[1] Arbitration Petition No. 677 of 2015

[2] (1999) 9 SCC 249

[3] (1999) 9 SCC 188

[4] (2002) 6 SCC 201

[5] (2010) 3 SCC 267

[6] Section 26 of the Amending Act –
Act not to apply to pending arbitral proceedings- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

[7] Section 11(8) of the Amendment Act-
"(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to— (a) any qualifications required for the arbitrator by the agreement of the parties; and (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";

[8] Section 12 (5) of the Act read with the newly enacted Seventh Schedule identifies three categories of situations in which people would be ineligible to serve as arbitrators on an arbitral tribunal (i) when the arbitrator has a relationship with one of the parties; (ii) has provided advice/an opinion to a party to the dispute, or; (iii) has an interest in the outcome of the dispute. The first category of situations identifies a relationship of employment between the arbitrator and a party to the dispute. The Fifth Schedule elucidates that justifiable doubts as to the independence or impartiality of the arbitrator would arise when he is an employee.

[9] Deep Trading Company v. Indian Oil Corporation and Ors. (2013) 4 SCC 35 and North Eastern Railway v. Tripple Engineering Works. (2014) 9 SCC 288

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

on Simplification of registration for FPIs
September 26, 2024

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024